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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TRUCK DRIVERS LOCAL 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and FRED M. CAPUTO, an individual, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD

and

WELLS FARGO ARMORED SERVICE CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does 9(b)(3) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 159(b)(3), privilege a guard employer to withdraw recognition from and terminate an established bargaining relationship with its guard employees' collective bargaining representative because that union also admits non-guards to membership or is affiliated with an organization that admits non-guards to membership?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Fred Caputo, an individual member of Local 807, respectfully petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the judgment in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals is officially reported at 755 F.2d 5, and is reprinted in App. A, pp. 1a-23a. The decision and order of the National

Labor Relations Board is reported at 270 N.L.R.B. No. 106, and is reprinted in App. C, pp. 25a-46a. The decision and recommended order of the Administrative Law Judge is attached to the formal decision of the National Labor Relations Board and is reprinted in App. D, pp. 47a-76a.

JURISDICTION

The decision and judgment of the Court of Appeals for the Second Circuit was entered on February 5, 1985, and is reprinted in App. A, pp. 1a-23a. On March 26, 1985, the Court of Appeals entered an order denying a petition for rehearing and suggestion for rehearing in banc. It is reprinted in App. B, p. 24a. This Court has jurisdiction to review the judgment of the Court below pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Sections 8(a)(5) and 9(b)(3) of the Labor Management Relations Act, 1947, as amended ("the Act"), 29 U.S.C. §§ 158(a)(5) and 159(b)(3). These, and other relevant statutory provisions, are reprinted in App. E, pp. 77a-81a.

STATEMENT OF THE CASE

A. Statement of Facts

Wells Fargo Armored Services Corporation ("Wells Fargo") provides armored car services for the transportation and delivery of monies, securities and other valuables. On July 16, 1984, Teamsters Local 820, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, was certified by the National Labor Relations Board ("the Board") to represent Wells Fargo's employees in a unit including "all chauffeurs, custodians and guards working on trucks in its armored car division." Wells Fargo and Local 820 thereafter maintained a bargaining relationship

and executed a series of collective bargaining agreements. The most recent contract between Wells Fargo and Local 820 was effective from March 14, 1977 to March 16, 1980.

On about June 18, 1979, Wells Fargo was notified that Local 820 had been merged into Local 807, affiliated with the International Brotherhood of Teamsters, and that Local 807 was the successor to all rights and obligations in the 1977-80 collective bargaining agreement. Representatives of Local 807 then met with representatives of Wells Fargo and proceeded to administer the outstanding collective bargaining agreement. Wells Fargo never questioned Local 807's right to represent its employees.

On about February 26, 1980, Local 807 began bargaining with Wells Fargo over the terms of a new agreement. Some fourteen bargaining sessions were held during which time the parties stipulated that the agreement was extended and that all terms agreed upon in a successor agreement would be retroactive to March 17, 1980. On April 11 Wells Fargo made a "final offer" to the Union. On April 13 the Local 807 membership unanimously rejected this "final offer," and a strike ensued.

By letter dated June 2, 1980, Wells Fargo notified Local 807 that effective immediately it was withdrawing the voluntary recognition accorded Local 807 as the collective bargaining representative of its armored car employees. The withdrawal of recognition was based solely on an economic consideration, i.e., the Union's refusal to accept its final contract offer. During June 1980, Wells Fargo made its last contributions into the Local 807 Armored Car Division Pension Fund, a multiemployer trust.

B. Proceedings Below

1. *The Board*

Unfair labor practice charges were filed against Wells Fargo by Local 807 on June 11, 1980, and by Fred M.

Caputo, a Wells Fargo employee, on July 15, 1980. A complaint issued in the consolidated cases on October 21, 1980, alleging that Wells Fargo violated Section 8(a)(5) and (1) of the Act, on or about June 2, 1980, by withdrawing recognition from Local 807.

Wells Fargo denied the allegations, contending that the unit employees were "guards" under § 9(b)(3) of the Act; that Local 807 admits to membership employees other than "guards"; and that Wells Fargo therefore had a right under § 9(b)(3) to terminate its relationship with Local 807 at will.[1] Alternatively, it asserted that a "conflict of loyalties," either actual or potential, arose between the parties and employee-members, thereby permitting Wells Fargo to withdraw recognition from Local 807 under § 9(b)(3).

A nine-day evidentiary hearing was conducted on various dates between April 27, 1981, and January 7, 1982. On March 3, 1982, the Administrative Law Judge ("ALJ") issued his decision. He found that Wells Fargo's withdrawal of recognition violated § 8(a)(5) and (1) of the Act. While § 9(b)(3) prohibits Board certification of a "mixed guard" union (see n.1, *supra*), nothing in that section outlaws voluntary recognition of such a union. Thus, while a guard employer may not be compelled initially to recognize a "mixed guard" union, nevertheless, once having granted such recognition voluntarily, it is estopped from withdrawing recognition.

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[1] Section 9(b)(3) of the Act prohibits the Board from certifying a union to represent a unit of "guards" if that union also admits non-guards to membership, or is affiliated directly or indirectly with an organization which admits non-guards to membership. The Board has termed such a union a "mixed guard" union. Local 807 is indisputably a "mixed-guard" union.

In 1948, the Board held that armored car drivers were not "guards" within the meaning of § 9(b)(3). *Brink's Inc.*, 77 N.L.R.B. 1182. In 1953, it reversed that ruling. *Armored Motor Service Co., Inc.*, 106 N.L.R.B. 1139 (1953)

Exceptions were filed from the Administrative Law Judge's decision, and on May 18, 1984, the Board, with Member Zimmerman dissenting, issued its Decision and Order dismissing the complaint. The Board adopted the ALJ's findings of fact, but disagreed with his conclusion. It held that § 9(b)(3) privileged Wells Fargo to repudiate the bargaining relationship at will upon the expiration of the agreement. Otherwise, it reasoned, the Union could obtain "indirectly—by a bargaining order—what it could not obtain directly—by certification—i.e., it compels the Respondent to bargain with the Union." [App. C, p. 28a]

Because of the purpose of § 9(b)(3)—to shield guard employers from potential divided loyalties if a union represented both guard and non-guard employees—the Board found no basis to distinguish between initial certification and the compulsory maintenance of an established bargaining relationship. "In either case, saddling the employer with an obligation to bargain presents it with . . . the same potential conflict of loyalties that Section 9(b)(3) was designed to avoid." [App. C. p. 32a]

The Board acknowledged that its decision exceeded the literal wording of § 9(b)(3) which prohibits only certification, but concluded that a "too literal reading . . . effectively would thwart" its purpose. [*Id.*, p. 34a] Finally, the Board rejected the theory that Wells Fargo's voluntary recognition estopped it from withdrawing recognition; as the "*intended beneficiary* of the statute" (*id.*, pp. 35a-36a), it was free to assert its rights under § 9(b)(3) and refuse to bargain.

Member Zimmerman dissented from the Board's "novel but untenably expansive construction of Section 9(b)(3)" (*id.*, p. 38a), endorsing the distinction between the Board's creation and maintenance of a bargaining relationship. "The result here is not only far beyond either

the words of Section 9(b)(3) or its legislative history, it envisions a form of collective bargaining that is foreign to the statute as a whole . . . [and] contrary to the stability of collective-bargaining relationships promoted by the statute." [*Id.*, p. 45a]

2. *The Court of Appeals*

On Local 807's petition for review, the Second Circuit Court of Appeals upheld the Board's decision over the dissent of Circuit Judge Mansfield. Recognizing that a guard employer voluntarily can recognize a "mixed guard" union, it nonetheless concluded that the ban on certification and the legislative history of § 9(b)(3) evidenced that Congress disfavored such relationships. "Moreover, it is reasonable to infer . . . that the preclusion of certification portends more than merely a simple check on the Board's power to certify the results of an election." [App. A., p. 10a]

The court rejected the distinction between initial certification and the forced continuation of a voluntary relationship. "There is sufficient support for the Board's conclusion that in enacting the statute, Congress knowingly decreased the stability of bargaining relationships in order to further its objective of protecting employers from the potential for divided loyalty." [*Id.*, p. 11a] Thus, the court rejected the argument that the employer was estopped from refusing to recognize the union, holding that estoppel applies only when dealing with a certifiable union. In its view, the employer's option to recognize the union does not make that option forever binding.

Circuit Judge Mansfield dissented, concluding that the Act does not authorize an employer unilaterally to withdraw recognition of a union with which it has bargained for over 30 years because that labor organization is a "mixed guard" union that now could not be certified. In his view, the majority's decision was "fundamentally un-

fair to the employees" (*id.*, p. 22a), and warned that it would have:

> a profound effect on the stability of collective bargaining relationships in businesses employing guards of many sorts throughout the nation . . . . [T]he Board's action is unfortunate. Its effect is to upset well-established labor relationships by conferring upon employers of such personnel an unfair advantage going beyond the purpose and plain language of the Act. [*Id.*, p. 13a]

Since 9(b)(3) prohibits only certification of a mixed guard union, and "guards" still retain rights as "employees" under the Act, he criticized the majority for rewriting the Act by expanding the certification ban beyond its literal language. Congress, he wrote, refused to make certification a prerequisite to the § 8(a)(5) duty to bargain or to outlaw "mixed-guard" union representation. Thus, he endorsed the distinction between creating an initial relationship and maintaining a relationship created by the parties.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW WILL SEVERELY DESTABILIZE EXISTING LABOR RELATIONSHIPS AND REVIEW WILL BE FORECLOSED UNLESS CERTIORARI IS GRANTED

This case involves the collective bargaining rights of employees whom the Board treats as "guards" under § 9(b)(3) of the Act.[2] Section 9(b)(3) performs two functions: it prevents the Board from deciding that a unit is "appropriate" for collective bargaining purposes

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[2] Section 9(b)(3) defines "guard" as "any individual employed . . . to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." As noted, *supra* n. 1, since 1953 the Board has treated armored car drivers as guards. Petitioners challenge the propriety of that determination but do not seek review of that issue in this case.

if it includes both guards and non-guards; and it provides that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." [App. E, p. 78a]

In this case, there was no question that the bargaining unit was "appropriate," as it included only employees whom the Board treats as "guards," and that Local 807 is a mixed guard union. The question posed in this case of first impression is whether the § 9(b)(3) ban on certification privileges a guard employer to repudiate a long standing bargaining relationship with a "mixed guard" union, at its whim, notwithstanding the general prohibition of such action imposed by § 8(a)(5) of the Act and the overall policy of the Act.

As Circuit Judge Mansfield warned:

> This case of first impression is important since our decision can have a profound effect on the stability of collective bargaining relationships in businesses employing guards of many sorts throughout the nation (including plant guards, contract guards, armored car drivers and guards, couriers and deliverymen), who are represented by mixed-guard unions of their own choosing. . . . [T]he Board's action . . . is unfortunate. Its effect is to upset well-established labor relationships by conferring upon employers of such personnel an unfair advantage going beyond the purpose and plain language of the Act. [App. A at 13a.]

The implications of this case are far-reaching, potentially affecting many thousands of guards who are represented by mixed guard unions. Based on its victory against Local 807, Wells Fargo no doubt will attempt to rid itself of its bargaining relationships with Teamster local unions throughout its system. Its competitors may

follow suit,[3] and guard employers of all sorts will be free to terminate their bargaining relationships at their whim. Their employees will be deprived of the benefits of union representation, including valuable health coverage and pension rights, which they have enjoyed in some cases for decades.

Since the Board validated this conduct it will recur. Yet, the Board's General Counsel will not issue future complaints. She has already exercised her discretion in refusing to issue complaints in several similar cases (*supra*, n. 3) based on the Board's decision here, and her discretion is unreviewable. § 3(d) of the Act, 29 U.S.C. § 153(d). *See, e.g., United Electrical Contractors Ass'n* v. *Ordman*, 366 F.2d 776 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967). Therefore, no other court of appeals will have an opportunity to address this issue, and no other case will come to this Court presenting the issue.

Unless certiorari is granted, the law will be frozen in its current posture, with no further chance for review. In that event, "mixed guard" unions will have lost any chance to salvage representational rights for thousands of employees. The absence of a conflict among the circuits on this precise § 9(b)(3) issue is, in our view, not

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[3] Even in anticipation of the Board's decision here, several armored car companies in locations around the country had followed Wells Fargo's example. After the decision in this case issued, the Board's General Counsel refused to issue complaints over such conduct based on the Board's decision. Local 807 alone had three such cases: *Brink's Inc.*, NLRB Case No. 2-CA-20171, charge dismissed May 31, 1984; *Purolator Armored Car*, Case No. 29-CA-11010, charge dismissed June 13, 1984; *Brink's, Inc., Air Courier Div.*, Case No. 2-CA-20181, charge dismissed May 31, 1984. On May 31, 1984, the General Counsel decided to dismiss charges filed in at least three other cases by Teamsters Local Unions over withdrawals of recognition. *Armored Motor Transport of California, Inc.*, Case No. 32-CA-5758; *United Courier Inc.*, Case No. 32-CA-6291; and *Gelco Express Corp.*, Case No. 32-CA-6380.

a sufficient reason for the Court to deny certiorari, in light of the importance of the question presented to the administration of the Act, and the conflict of the decision below with the language, policy and legislative history of the statute and with decisions of this Court. Certainly, the extensive dissenting opinions in this case evidence a split of judgment on this issue.

II. THE DECISIONS BELOW ARE FUNDAMENTALLY INCONSISTENT WITH THE LANGUAGE AND STRUCTURE OF THE ACT AND WITH DECISIONS OF THIS COURT

A. The Decisions Below Exceed The Narrow Language of § 9(b)(3)

Section 9(b)(3) was enacted in 1947 as part of the Taft-Hartley amendments to the National Labor Relations Act in order to deal with a very specific and limited problem. The section was triggered by the reasoning of the Sixth Circuit Court of Appeals in *NLRB* v. *Jones & Laughlin Steel Corporation*, 154 F.2d 932 (6th Cir. 1946). Though it was later reversed by this Court (331 U.S. 416 (1947)), the court held that while militarized plant guards were "employees" under the Act, if they were represented by the same union as the general plant employees, a conflict might arise when the guards were required to protect the employer's property and personnel.[4] If strikes or industrial unrest occurred involving production employees, the plant guards' obligations, to enforce rules or regulations they were hired to enforce, would conflict with their obligation to their union which, as the representative of production employees, had authorized and directed the strike.

While Congress was debating the 1947 Taft-Hartley amendments, the Supreme Court reversed the Sixth Circuit. The House responded by proposing to exclude from

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[4] *See also NLRB* v. *Atkins & Co.*, 155 F.2d 567 (7th Cir. 1946), *revd.*, 331 U.S. 398 (1947).

the Act's coverage individuals employed in "police . . . matters." [5] The House Report justified this exclusion by pointing to the need of management to have "faithful agents" without the risk of divided loyalty, stating that "plant policemen and guards prevent disorder and report misconduct of employees and of unions and their members." [6]

The Senate Bill included guards within the Act's coverage. The resulting compromise, Section 9(b)(3) of the Labor-Management Relations Act, was drafted in conference. As stated, the Section performs two functions. While a unit composed of guards and non-guards is inappropriate for any purpose, a unit composed solely of guards is appropriate. The only limitation is that a mixed guard union cannot be *certified* to represent such a unit. *William J. Burns Intl. Detective Agency*, 134 N.L.R.B. 451, 452 (1961) ("The distinction implicit in the language bears careful note"). Quite clearly, however, "[u]nder the language of clause (3), guards still retain their rights as employees under the National Labor Relations Act. . . ." [7]

Nothing in § 9(b)(3) prohibits voluntary recognition of a "mixed guard" union or membership in such a union. "[W]hile the statute forecloses certification by the Board of a disqualified union, it does not deprive the guards of the right granted under Section 7 'to bargain collectively through representatives of their own choosing.'" *Rock-Hill-Uris, Inc.* v. *McLeod*, 236 F. Supp. 395, 398 (S.D.N.Y. 1964), *affd.*, 344 F.2d 697 (2d Cir. 1965).

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[5] H.R. 3020, 80th Cong., 1st Sess. (1947), Sec. 2(12)(b), I NLRB, Legislative History of the Labor Management Relations Act of 1947, p. 41.

[6] See, House Report No. 245, 80th Cong., 1st Sess. 16 (1947), I NLRB, Legis. Hist. LMRA, 1947, p. 307.

[7] 93 Cong. Rec. 6601, 80th Cong., 1st Sess. (1947), II NLRB, Legis. Hist. LMRA, 1947, p. 1541.

See also Teamsters Local 344 v. *NLRB*, 568 F.2d 12, 20 (7th Cir. 1978); *NLRB* v. *Bel-Air Mart, Inc.*, 497 F.2d 322 (4th Cir. 1974); *NLRB* v. *White Superior Div., White Motor Corp.*, 404 F.2d 1100 (6th Cir. 1968).

While the Board has defined "guard" more expansively than the plain language of the statute requires,[8] it nonetheless, up until this case, has compelled guard employers to honor their employees' statutory rights. The decision in this case deviates from that approach, and the result clearly exceeds the limited language of § 9 (b) (3). As Circuit Judge Mansfield stated, the "majority seeks to rewrite the Act . . . relying on its own *ipse dixit* that 'it is reasonable to infer . . . that the preclusion of certification portends more than merely a simple check on the Board's power to certify the results of an election.' . . . Nothing in the statutory language or decisions under the statute supports that broad statement." [App. A, p. 19a-20a] [9]

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[8] *See generally* Steven H. Kahn, "The NLRB's Misinterpretation of the Guard Provision," *Labor Law Journal* (June 1984). The Board first held that § 9(b) (3) was limited to plant guards employed to protect property of their own employer, because of the potential conflict they might face in enforcing rules against coworkers who were members of the same union. *Brink's Inc.*, 77 N.L.R.B. 1182 (1948). Then, the definition was extended to employees functioning as plant guards, but employed under contract to perform guard services for customers of their employer. *American District Tel. Co.*, 83 N.L.R.B. 517 (1949). In 1953, the Board went further to hold that armored car drivers were guards. *Armored Motor Service Co.*, 106 N.L.R.B. 1139. And, in 1976, unarmed couriers employed by express delivery services were held to be guards. *Brink's Inc.*, 226 N.L.R.B. 1182. One jurist has stated that the Board's expansive definition "would even apply to delivery - men." *Teamsters Local 71* v. *NLRB*, 553 F.2d 1368, 1378 n.3 (D.C. Cir. 1977) (Bazelon, C.J., dissenting).

[9] "In view of the scalpel-like precision with which Congress, after much debate, chose its compromising language, we should adhere to its plain unambiguous terms. *See e.g., Garcia* v. *United States*, 105 S. Ct. 479 (1984) (when court finds the terms of a statute un-

B. The Decisions Below Contravene the Plain Language of § 8(a)(5) and Conflict With Decisions Of This Court

Nothing in the language of the statute makes certification a prerequisite to the duty to bargain under § 8(a)(5). *NLRB* v. *Gissel Packing Co.*, 395 U.S 575 (1969). While § 9(b)(3) prevents the Board from compelling a guard employer to recognize a "mixed guard" union *de novo*, there is no statutory language barring the compulsory maintenance, under § 8(a)(5) of the Act, of an established relationship with an uncertifiable union. The general design of the Taft-Hartley amendments supports this distinction.

The House passed a bill which sought to amend § 8(5) of the National Labor Relations Act (the Wagner Act) so as to permit the Board to find a violation of the duty to bargain only where the employer had failed to bargain with a union "currently recognized by the employer or certified as such under Section 9." § 8(a)(5) of H.R. 3020, 80th Cong., 1st Sess. (1947), I Legis. Hist. LMRA, 1947, p. 178. The House Report reveals that this proposal was expressly intended to place recognition of an uncertified union wholly at the option of the employer. House Report No. 245 on H.R. 3020, p. 30, I Legis. Hist. LMRA, 1947, p. 321.

The proposal was rejected in Conference. H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41, I Legis. Hist. LMRA, 1947, p. 545. Instead, the Conference accepted the Senate bill version which retained the language of § 8(5) of the Wagner Act. I Legis. Hist. LMRA, 1947, p. 511. Thus, it remained an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees *subject to the provisions*

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ambiguous, its inquiry is complete, except in 'rare and exceptional circumstances') (quoting *Crooks* v. *Harrelson*, 282 U.S. 55, 60 (1930))." [App. A. p. 19a, Mansfield, dissenting]

of section 9(a)" (emphasis added). Congress refused to foist upon § 8(a)(5) a prerequisite of certification under § 9(c) of the Act, 29 U.S.C. § 159(c). The only requirement was that of § 9(a), that the representative invoking the bargaining obligation be "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes. . . ." 29 U.S.C. § 159(a).

Notwithstanding this history, the Second Circuit majority ruled that certifiability was a prerequisite to this § 8(a)(5) refusal to bargain violation. It noted as follows:

> Section 8(a)(5) is silent as to whether a union must be certifiable in order to invoke its protections. A suggested amendment, providing that only currently recognized or certified unions could bring unfair labor practice complaints against an employer charging a refusal to bargain, Legislative History, *supra* at 321, was not adopted in conference. *Id.* at 1538. The refusal to require certification as a standing prerequisite for bringing complaints under Section 8(a)(5) does not support Local 807's arguments as to Section 9(b)(3). Congress' refusal may mean that *uncertified* unions which may be eligible for certification have rights under Section 8(a)(5), but it does not necessarily follow that *uncertifiable* unions have the same rights. [App. A. p. 10a]

This conclusion directly conflicts with this Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62 (1956). In that case, this Court discussed an employer's duty to bargain under § 8(a)(5) with a union which failed to comply with the provisions of § 9(f), (g) and (h) of the Act (repealed in 1959).[10] Like § 9(b)(3), those sections were enacted by the Taft-Hartley amendments. They required unions to file with

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[10] 29 U.S.C. § 159(f), (g) and (h), 61 Stat. 145-146, as amended, 65 Stat. 602 (repealed in 1959) (reprinted in App. E, pp. 79a-81a).

the Secretary of Labor reports containing financial and organizational data and, with the Board, affidavits of non-communist affiliation. Non-complying unions, like "mixed guard" unions, could not receive Board certification. But, in addition, a non-complying union was barred from invoking the Board's processes either in unfair labor practice proceedings or representation cases. This Court held quite clearly that the duty to bargain with a non-complying union nonetheless exists, subject only to the provisions of section 9(a). As it held:

> Section 8(a)(5) declares it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a).*" (Emphasis supplied.) Section 9(a) which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen . . . It does not make it a condition that the representative shall have complied with § 9(f), (g) and (h) or shall be certified by the Board, *or even be eligible for such certification.* [351 U.S. at 71-72 (emphasis added).]
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> * * *
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> Subsections (f), (g) and (h) of section 9 merely describe the advantages that may be gained by compliance with their conditions. The very specificity of the advantages to be gained and the express provision for the loss of these advantages imply that no consequences other than those so listed shall result from non-compliance. [*Id.* at 73]

This analysis was reaffirmed in *NLRB* v. *District 50, United Mine Workers*, 355 U.S. 453 (1958). Of similar effect, "certification gives an organization which achieves it additional rights not all its rights." *NLRB* v. *White Superior Div.*, 404 F.2d at 1103 n.5. Under the Wagner Act, certification entailed few, if any, advantages over voluntary recognition. However, as this Court noted in *Gissel Packing*, 395 U.S. 598-99, under the 1947 amendments:

> [a] certified union has the benefit of numerous special privileges which are not accorded unions recognized voluntarily or under a bargaining order [14] and which, Congress could determine, should not be dispensed unless a union has survived the crucible of a secret ballot election.

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[14] E.g., protection against the filing of new election petitions by rival unions or employees seeking decertification for 12 months (§ 9(c)(3)), protection for a reasonable period, usually one year, against any disruption of the bargaining relationship because of claims that the union no longer represents a majority . . ., protection against recognitional picketing by rival unions § 8(b)(4)(C)), and freedom from the restrictions placed in work assignment disputes by § 8(b)(4)(D), and on recognitional and organizational picketing by § 8(b)(7).

In putting together the final version of the Act in 1947, the Conference drafted § 9(b)(3) as a compromise and at the same time rejected certification as a prerequisite to a § 8(a)(5) violation. The amendments also rendered Board certification more meaningful, reserving its special benefits to unions whose status had been tested in a secret ballot election.[11] By conditioning an employer's duty to bargain with a union on its certifiability, the Second Circuit attributed far too much to certification, much more than Congress intended. Surely Congress fashioned the certification ban in tandem with the special advantages its amendments attached to certification. Had Congress wanted to do more than simply deny "mixed-guard" unions the enumerated advantages of a certification, it could have inserted express language in the statute to accomplish that result.[12]

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[11] The 1947 amendments also made a Board-conducted election the sole basis for achieving certification. Section 9(c) of the Wagner Act had provided for Board certification after elections or "any other suitable method to ascertain [the employees'] representatives." I NLRB, Legislative History of the National Labor Relations Act of 1935, p. 3274.

[12] "[W]hen Congress wished to disqualify a union not only from certification but, more broadly, from resort to the Board for the

Nothing in the statutory language or legislative history supports the result reached in this case. These decisions therefore warrant review by this Court. Otherwise the Board, under the guise of administration of the Act, will have obliterated important employee rights by putting limitations in the statute not placed there by Congress, achieving that which Congress refused to enact into law.

III. THE DECISIONS BELOW THWART THE STATUTORY POLICY TO PROMOTE STABILITY IN LABOR-MANAGEMENT RELATIONSHIPS AND CONFLICT WITH THE APPROACH OF THE THIRD CIRCUIT COURT OF APPEALS

The Board and the Second Circuit justified their departure from the plain language of the statute on the purpose of § 9(b)(3) to shield guard employers from any potential conflict of loyalties problem. The result, however, is that this shield has become a Sword of Damocles, ever threatening to extinguish employees' collective bargaining rights and to destabilize labor relations in entire industries. Destroying statutory rights merely to protect an employer from some speculative and highly unlikely conflict of loyalties distorts the language of § 9(b)(3) and exalts it over the general statutory design and policy.[13]

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protection of existing bargaining relationships, Congress well knew how to achieve that end." Thus, § 9(f), (g) and (h) "not only disqualified non-complying unions from having their [representation] petitions processed, they further, and specifically, provided that their charges could not result in complaints." [App. C. at 40a, Zimmerman dissent] As discussed, however, even in the case of § 9(f), (g) and (h), compliance was not a prerequisite to an employer's obligation to bargain (*Arkansas Oak Flooring*, 351 U.S. 62; *NLRB* v. *District 50, United Mine Workers*, 355 U.S. 453), merely to the union's filing an unfair labor practice charge.

Section 9(b)(3), by contrast, contains no preclusion on a mixed guard union filing a charge. Nor does it make a unit composed exclusively of guards inappropriate if it is represented by a mixed guard union. Congress could have so provided, but it did not.

[13] It is clear that the withdrawal of recognition here was totally unrelated to security or divided loyalties problems. The Board adopted the Administrative Law Judge's findings that economic

The Act's chief purpose is to encourage stable labor relationships. In furtherance of that purpose, it is general Board policy that an employer who has voluntarily recognized a union must maintain that relationship, absent a good faith doubt of the union's majority status. An employer has a right, absent the commission of unfair labor practices, to insist on a Board conducted election before recognizing a union. *Linden Lumber Division* v. *NLRB*, 419 U.S. 301 (1974). But, once it voluntarily recognizes a majority union, no matter how informally, the right is lost. "[O]nce an employer has affirmatively agreed to recognize a union, it cannot change its mind." *NLRB* v. *Brown & Connolly, Inc.*, 593 F.2d 1373, 1374 (1st Cir. 1979). Once a voluntary bargaining relationship is established, it "must be permitted to continue and recognition may not be withdrawn at will." *NLRB* v. *A. Lasaponara & Sons, Inc.*, 541 F.2d 992 (2d Cir. 1976), *cert. denied*, 430 U.S. 914 (1977). Moreover, "[v]oluntary recognition is a favored element of national labor policy." *NLRB* v. *Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978).

In accordance with these principles, the Administrative Law Judge and the dissenting Board Member and Circuit Judge all reasoned that a guard employer, having voluntarily entered into a bargaining relationship with a mixed guard union, was estopped from repudiating that relationship. By contrast, the Second Circuit upheld the Board in rejecting that approach, elevating the narrow purpose of § 9(b)(3) over the overall purpose of the Act. Its decision conflicts with the Third Circuit Court of Appeal's approach in an analogous situation.

The Third Circuit ordered a voluntary bargaining relationship to be maintained under § 8(a)(5) even where

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reasons, and not divided loyalties, prompted Wells Fargo's withdrawal of recognition of Local 807, and that over the last 30 years, Wells Fargo's employees had experienced no actual or potential conflict of loyalties.

the Board could not have certified the union because of the provisions of § 9(b)(1) of the Act. 29 U.S.C. § 159(b)(1). *International Telegraph and Telephone Corp.* v. *NLRB*, 382 F.2d 366 (1967), *cert. denied*, 389 U.S. 1039 (1968). That section, also enacted contemporaneously with § 9(b)(3), prevents the Board from deciding that a unit is appropriate if it includes both professional and non-professional employees, unless the professional employees have voted for inclusion in such a unit. [App. E, p. 77a-78a] In *ITT*, the Board in 1951 had improperly certified a professional and non-professional unit without holding a self-determination election. In 1958 this Court, in *Leedom* v. *Kyne*, 358 U.S. 184, held that such a certification would be illegal. Nonetheless, even after that, the parties maintained the relationship voluntarily until 1964 when, after a strike, the employer withdrew recognition.

The Third Circuit upheld the Board's decision that the employer had unlawfully withdrawn recognition, despite the fact that the original certification may have violated § 9(b)(1). It stated that nothing in § 9(b)(1) prohibits the parties from maintaining and recognizing such a unit consensually, and the parties had done so for many years, even after notice that the original certification was made in error. 382 F.2d at 370.

In *NLRB* v. *Cardox Div. of Chemetron Corp.*, 699 F.2d 148, 154-55 (1983) the Third Circuit reaffirmed its *ITT* reasoning, emphasizing that the bargaining unit in question there was not "inherently inappropriate." Even though the Board validly could not have created it, the parties voluntarily could agree to it, as they did. In those circumstances, the employer was estopped from repudiating the relationship. In *Cardox*, the Third Circuit decided that the sole prerequisite for a § 8(a)(5) refusal to bargain violation in a voluntary recognition case is that the bargaining *unit* not be totally inconsistent with the Act. For example, in *Supreme Sugar Company*, 258

N.L.R.B. 243, 245 (1981), where the *unit* contained both guards and non-guards, the Board dismissed a § 8(a)(5) charge. 699 F.2d at 155-56.

In the case of guards, the Act's only appropriate unit requirement is that it not include both guards and non-guards. The certification ban of § 9(b)(3) has no bearing on the appropriate *unit* question. *See Burns*, 134 N.L.R.B. at 452. Indisputably, the unit at issue here is appropriate and not inconsistent with the Act. Under the Third Circuit's approach, Wells Fargo, having maintained a voluntarily created relationship with a "mixed guard" union in an appropriate unit for over 30 years, would have been estopped to repudiate it.

Obviously, the Third Circuit's approach better furthers the Act's policy to encourage stable labor relations. Review of this case is warranted in order to resolve this difference of approach and to restore a proper balance between the conflicting purposes of § 9(b)(3) and of the Act as a whole. Absent review, far-reaching destabilization in labor relationships may result.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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